LIBRARY
SUPREME COURT, U. S.

Supreme Court, U.S.
FILED
AUG 10 1970
E. ROBERT SEAVER, CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1970

PAUL CHAPLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

ERWIN N. GRISWOLD,
Solicitor General,

WILL WILSON,
Assistant Attorney General,

BEATRICE ROSENBERG,
Attorney,
Department of Justice,
Washington, D. C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 408

PAUL CHAPLIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on May 21, 1970. The time to file a petition for a writ of certiorari was extended, by order of Mr. Justice Harlan dated June 18, 1970, to July 20, 1970.

and the petition was filed on July 16, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether agents were justified in searching an automobile without a warrant.

2. Whether petitioner was denied an opportunity to litigate fully his motion to suppress.

STATEMENT

Following a non-jury trial, the petitioner was convicted in the United States District Court for the Southern District of New York of the unlawful receipt and concealment of approximately 100 grams of heroin in violation of 21 U.S.C. 173, 174 (R. 204-205). On November 20, 1968, he was sentenced to a term of five years—the sentence to commence upon the expiration of a State sentence he was then serving and to run concurrently with another five-year term imposed in another case (R. 213-214). The court of appeals affirmed *per curiam*.

1. Prior to trial, petitioner moved to suppress a quantity of heroin allegedly seized from his car at the time of his arrest. John O'Brien, a federal narcotics agent, was the sole witness to testify (H.R.).[1] He had been conducting a narcotics investigation of two brothers named Esposito during the months of September and October, 1967 (H.R. 3-4). On Sep-

[1] "H.R." refers to the record of the preliminary hearing, a copy of which is on file with the Clerk of this Court.

tember 27, 1967, he saw the petitioner pass a thick roll of bills to Cookie Esposito in a place known as the Dugout Tavern (H.R. 4-5). O'Brien followed the Esposito brothers (H.R. 5-6). They entered a nearby building and then drove to the vicinity of a motel, where they parked behind a red Cadillac driven by the petitioner (H.R. 6-7). Petitioner entered the Esposito car (H.R. 8). O'Brien testified that when petitioner left, he was supporting something under his jacket (H.R. 8).

O'Brien next saw petitioner on October 4, 1967. At that time, the Esposito brothers were engaged in conversation with petitioner on the sidewalk in front of the Dugout Tavern (H.R. 12). Another agent told O'Brien that he had heard Cookie Esposito say to petitioner and another man, "The same price as the last time" (H.R. 12, 14-16). Petitioner and the other man then drove off in a green Cadillac (H.R. 16). Upon checking the license plate number of this car, O'Brien discovered that it belonged to a person mentioned in numerous files as a suspected narcotics violator (H.R. 16-17).

On October 9, 1967, the Esposito brothers met petitioner (seated in a red Cadillac) in front of the Dugout Tavern (H.R. 19-20). They entered the car and drove a short distance to where their own car was parked (H.R. 19-20).[2] One of the brothers en-

---

[2] At the trial another agent, Cushing, testified that earlier that evening he had seen Cookie Esposito go to his car and that he appeared to be placing a package or item in the glove compartment (R. 136-137). Cushing communicated this information to the other agents, including agent O'Brien (R. 136-137).

tered his car for a brief period and then returned to the driver's side of the Cadillac (H.R. 20-21). After the other brother left the Cadillac, it drove off (H.R. 21). O'Brien and two other agents, in two vehicles, followed and finally overtook petitioner (H.R. 23, 32). After identifying himself as a federal narcotics agent, agent O'Brien placed petitioner under arrest (H.R. 24). O'Brien searched petitioner's car and found a brown paper package under the seat (H.R. 24, 42). The contents of this package were later identified as heroin (R. 40-42).

2. The hearing judge, on August 15, 1968, denied the motion to suppress "without prejudice to renewal at the trial" (R. 2). Immediately prior to trial, counsel for the petitioner expressed his intent to renew the motion, requesting that it be heard *de novo*. The trial judge refused either to review the ruling or to decide *de novo* (R. 3). However, the pretrial motion was reopened and supplemented with the testimony of an additional witness (R. 9-10). This witness testified that he had seen the agents stop the petitioner's car on the night of October 9, 1967, and that after they identified themselves to him, he walked away and they left shortly thereafter (R. 9-10). Following this testimony, the trial judge held that it was not sufficient to change the ruling on the pretrial motion (R. 17).

ARGUMENT

1. The facts set forth in the statement amply demonstrate probable cause for the arrest of petitioner and the search of his car. While O'Brien did

not actually see any package pass between the Espositos and petitioner, he could, based upon his past observations as well as what transpired that evening, reasonably conclude, as he did (H.R. 22) that narcotics had been transferred from the Espositos' car to the Cadillac.

The agents did not need a warrant to search the vehicle, reasonably believed to be carrying contraband. See *Carroll* v. *United States*, 267 U.S. 132; *Brinegar* v. *United States*, 338 U.S. 160. *Chambers* v. *Maroney*, No. 830, O.T. 1969, decided June 22, 1970. Since there was probable cause to search, the search was, under *Chambers*, valid whether or not it was incidental to the arrest.

2. Petitioner also contends that the denial of his pretrial motion to suppress "without prejudice * * * to renew [al] at the trial" entitled him to a hearing *de novo* on the motion, and that the trial judge's refusal to grant such a hearing amounted to a violation of due process in that he never had a determination on the merits of his motion (Pet. 12). There is no merit to this claim. The basic purpose of Rule 41(e) of the Federal Rules of Criminal Procedure is to prevent, so far as possible, the delay and confusion which would result were attacks upon the admissibility of illegally seized evidence made during the trial itself. *Waldron* v. *United States*, 219 F. 2d 37, 41 (C.A. D.C.). This purpose would be defeated if one who had a full hearing upon a pretrial motion to suppress were entitled to another full hearing at trial.

The denial "without prejudice" merely made explicit what would have been the rule in any event—

that the ruling on the motion did not bar reconsideration by the trial judge if new facts developed at the trial. Here, upon renewal of the motion at trial, the hearing was reopened and additional testimony taken. This was properly found not to change the pre-trial disposition of the motion to suppress. Since renewal of the motion produced no substantial new or additional facts, petitioner was entitled to nothing further. *United States* v. *Culotta*, 413 F. 2d 1343, 1345 (C.A. 2).

CONCLUSION

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
Attorney.

AUGUST 1970.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1970 400562 94